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Division II
State of Washington

NO. 48982-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE,
PUBLIC COUNSEL UNIT,

Appellant,

v.

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, a Washington state agency

Respondent,

and

AVISTA CORPORATION, d/b/a AVISTA UTILITIES

Intervenor-Respondent

ANSWERING BRIEF OF INTERVENOR-RESPONDENT AVISTA CORPORATION TO AMICUS CURIAE BRIEF OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, PUBLIC COUNSEL UNIT, Appellant, v. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, a Washington state agency, Respondent, AVISTA CORPORATION, d/b/a AVISTA UTILITIES, Intervenor-Respondent.	**ANSWERING BRIEF OF INTERVENOR-RESPONDENT AVISTA CORPORATION TO AMICUS CURIAE BRIEF OF THE INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES**

I. INTRODUCTION

COMES NOW, Avista Corporation, Intervenor-Respondent herein, and respectfully replies to the Amicus Brief of the Industrial Customers of Northwest Utilities ("ICNU"), filed on July 7, 2017. In its Brief, ICNU largely reiterates the arguments of Public Counsel, as Appellant. ICNU's Brief, while meant to be helpful to the Court, provides no fresh insights concerning the legal parameters within which the Commission operates. It does not address how the Commission could arrive at "just, fair,

reasonable and sufficient" rates (see RCW 80.28.010) without the use of an attrition adjustment under the circumstances now confronting utilities – i.e., where the growth in plant investment and expenses far outstrips the growth in revenues. Moreover, it provides no recognition, whatsoever, of the role of the Commission as a finder of fact. What is, after all, "used and useful" plant is ultimately a question of fact meant for the regulator, acting within the sphere of its expertise. That is made clear by the very words of the statute at issue, RCW 80.04.250: ". . . [t]he Commission has the power . . . to ascertain and determine the fair value of the property that is used and useful for service. . .." (Emphasis added) Accordingly, the Commission's statutory charge is clear and unambiguous. Moreover, as explained in Avista's Answering Brief, the Commission has any number of recognized "tools" in its toolbox in order to determine the overall level of plant that is "used and useful" during the period new rates are in effect.

Contrary to ICNU's assertions, the Commission's decision was based on sound evidence in the form of an attrition study – it was not "mere fiat, divorced from any tether to statute or methodological development." (ICNU Brief at 16) Indeed, were the Commission denied the use of the recognized tool of an "attrition adjustment," it would be unable to satisfy its statutory (and constitutional) mandate to provide for "just, fair, reasonable and sufficient rates." (See RCW 80.28.010)

Accordingly, the real "danger" in this appeal, is not the application of a constitutionally required "end results" test as argued by ICNU, but rather would be in the disruption of a regulatory regime carefully authored

by the legislature, in which the Commission has been vested with the authority to act within its sphere of expertise and resolve disputed questions of fact around what is "used and useful."

Just because there are disputes over what is or isn't "used and useful" plant, does not turn that issue into a question of law. Instead, it is still ultimately a question of fact to be decided by the Commission. In the final analysis, only the Commission can answer the question of what is the overall level of plant that will be used and useful during the rate-effective period. The overblown rhetoric of ICNU does not change that. (See, e.g., references to "unprincipled ratemaking," "divorced from any tether to statute or methodological development," that "will devolve into an expensive and time-consuming farce.") (See ICNU Brief at 15-16)

Avista, as a Respondent, believes it is important to understand that this case on appeal wholly rests on specific factual determinations by the Commission in support of its Attrition Adjustment and its ultimate determination of Avista's needed revenue requirement. As explained below, these factual issues were fully vetted by the parties before the Commission, not only during the hearing process, but in the Post-Order proceedings as well, involving Motions for Reconsideration and Clarification. Appellant has otherwise presented no fundamental questions of law, public policy or precedent warranting a different result. The Commission's Order was not arbitrary and capricious and was based on substantial evidence, as explained below. RCW 34.05.570(3)(e).

II. THE COMMISSION'S USE OF AN ATTRITION ADJUSTMENT DOES SATISFY THE "USED AND USEFUL" REQUIREMENT

Beginning at page 9 of its Brief, ICNU argues that the use of an attrition adjustment, as proposed by the Commission Staff and the Company does not satisfy the "used and useful" statute. (RCW 80.04.250)

Like Public Counsel, ICNU first contends that the use of an Attrition Adjustment, as applied to utility plant in service, violates the "used and useful" standards of RCW 80.04.250.[1] The Commission is no stranger to the interpretation of the "used and useful" language of the statute. Indeed, the very provisions of RCW 80.04.250 provide that "[t]he Commission has the power . . . to ascertain and determine" the fair value of the property that is "used and useful for service" (emphasis added). That is its charge.

To begin with, the legislature has vested the Commission with the authority to "ascertain and determine" the fair value of the property that is "used and useful" for service in this State. The statute is quite clear, in that regard. The Commission – not the courts – is in the best position to make this determination and its findings are entitled to deference by the courts.

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[1] RCW 80.04.250 Valuation of public service property.
(1) The commission has power upon complaint or upon its own motion to ascertain and determine the fair value for rate making purposes of the property of any public service company used and useful for service in this state and shall exercise such power whenever it deems such valuation or determination necessary or proper under any of the provisions of this title. In determining what property is used and useful for providing electric, gas, wastewater company services, or water service, the commission may include the reasonable costs of construction work in progress to the extent that the commission finds that inclusion is in the public interest. (Emphasis added) (2) – (3) [omitted].

(See, e.g., PacifiCorp v. WUTC, supra (Div. II 2016) for discussion of deference to findings of the Commission.)

It is well established that whether utility property is "used and useful" and therefore to be included in rate base, is a factual determination. Idaho Underground Water Users Ass'n v. Idaho Power Co., 89 Idaho 147, 404 P.2d 859 (1965); Kansas Gas & Elec. Co. v. State Corp. Com'n, 218 Kan. 670, 544 P.2d 1396 (1976); State ex rel. Utilities Com'n v. Gen. Tel. Co. of the S.E., 281 N.C. 318, 189 S.E.2d 705 (1972); Lake Superior Dist. P. Co. v. Pub. Serv. Com'n, 235 Wis. 667, 294 N.W. 45 (1940); State ex rel. Utilities Com'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (N.C. 1987).

ICNU, however, chooses to extract a snippet of testimony wherein Staff Witness McGuire (who prepared Staff's attrition study) quite appropriately testified that, "I am not testifying to the used and useful nature of any specific plant beyond July of 2015 . . .." (See Tr. 457:5-11 (McGuire)) (see also ICNU Brief at 10) (emphasis supplied). This testimony is not at all surprising, because it reflects an understanding of the true purpose of an attrition adjustment – i.e., to capture the overall level of plant that will be in-service and "used and useful" during the rate-effective period beginning in January of 2016. Indeed, if the parties were to only examine specific plant as of July of 2015 (before the start of the prospective rate period), this would not provide a reasonable opportunity for the Company to earn its authorized rate of return – as required by law. And that is why the Commission has looked to other tools for the purpose

of assessing the overall level of "used and useful" plant during the rate-effective period.

Both the Company and Staff prepared detailed attrition studies based on historical information and utilizing growth trends to best approximate the overall level of "used and useful plant, expenses and revenues" during the rate period. It is this "matching" of revenues, expenses and rate base that is the desired (indeed, essential) outcome of any rate-setting proceeding. If this fails, the utility will not be provided with a reasonable opportunity to earn its authorized rate of return.[2]

Next, as does Public Counsel, ICNU contends that the case of People's Org. for Wash. Energy Resources v. UTC, 101 Wn.2d 425 (1984) ("POWER84") answers the question. It does not. As earlier discussed in Avista's Answering Brief (pages 32-34), POWER84 is easily distinguishable, inasmuch as there was no disputed issue of fact over whether a generating plant under construction was "used and useful" during the rate period. (Indeed, the Company freely acknowledged at the time that the coal plant that was under construction, and would not be in service as of the date the new rates became effective.) That, however, is not the case here. Accordingly, ICNU's reliance on POWER (1984) is misplaced.[3] The sole question in POWER (1984) involved whether

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2 See Fed. Power Com'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944) (Hope) (methods by which government regulators determine a utility's rate are inconsequential so long as the end result is fair); Bluefield Water Works Co. v. Pub. Serv. Com'n, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed 1176 (1923).

3 People's Org. for Wash. Energy Res. v. Wash. Utils. & Transp. Com'n, 101 Wn.2d 425, 679 P.2d 922 (1984) .

inclusion of Construction Work in Progress (CWIP) in rate base violated the "used and useful" language of RCW 80.04.250. There, the CWIP at issue related to the Washington Water Power Company's (WWP) investment in admittedly unfinished coal-fired generating plants in Montana (Colstrip Units 3 and 4) and in the Washington Public Power Supply System (WPPSS) No. 3, a nuclear plant under construction in Gray's Harbor County, Washington. This was no factual dispute as to whether the uncompleted plant was in service – it was not. Accordingly, the sole issue was whether investment in an admittedly unfinished plant (CWIP) was "used and useful" for service within the meaning of RCW 80.04.250. The Court determined that, "obviously, an uncompleted utility plant is neither employed for service nor capable of being put to use for service; therefore, such a plant is not 'used and useful' for service as required by RCW 80.04.250, and the Commission exceeded its statutory authority by including CWIP in WWP's rate base." 101 Wn.2d at 430.

In the instant case on appeal, the parties are not arguing about a single generating plant under construction that all agreed would not be in service when the new rates became effective – there simply was no disputed issue of fact. Rather, at issue in the present case on appeal is whether the Commission rightly assessed, as a matter of fact, and within its sphere of expertise, the overall level of utility plant that will be in service and "used and useful" during the rate period. While the parties may differ in their assessment of what levels of plant will be "used and useful" during that rate-effective period, that difference of opinion still

remains a question of fact for the Commission to resolve – and does not become one of law.

The use of Attrition Adjustments by the Commission in the State of Washington is by no means a recent phenomenon. Public Counsel freely acknowledges that the WUTC has used Attrition Adjustments in past rate cases, citing to several decisions as early as the 1980s. (See Opening Brief at 30) (Public Counsel was an active participant in each of these proceedings and neither it nor any other party until now has raised the issue of whether the "used and useful" provisions of RCW 80.04.250 were violated.) Indeed, as noted by the Commission in its Order 05, on appeal, from 1978 to 1993 the Commission received and considered requests for Attrition Adjustments from all electric investor-owned utilities and several natural gas distribution companies in the State. (AR. 704) (Order 05 at p.19, ¶50)

Accordingly, the Commission in this State has employed Attrition Adjustments on numerous occasions over the past four decades. It is a well-known and accepted ratemaking "tool" used to combat earnings erosion so that the "end result" is reasonable. Public Counsel even concedes, "Attrition Adjustments are one tool available to regulators to address a utility's ability to earn a reasonable return." (See Opening Brief at 31)[4]

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[4] The Commission, over 30 years ago, employed an "Attrition Adjustment," based on the same sort of trending of rate base and expense growth, as was used in the instant case, in order to address attrition. See, WUTC v. Pacific Power & Light Co. (Cause Nos. U-82-12 and U-82-35 (1983)).

Essentially, ICNU, like Public Counsel, is challenging the Commission's use of an often-employed "tool" (Attrition Analysis employing growth factors) for determining an overall level of rate base that will be used and useful during the rate-effective period. The use of attrition adjustments by other state regulatory commissions as well, was previously chronicled in Avista's responsive brief at pages 15-17.

The Commission may elect to employ an adjustment such as an "Attrition Adjustment," as it has done in this and prior cases – or it may utilize other tools. This is an especially important "tool" to use when revenues produced by low load growth do not cover the costs of investing in new plant necessary to serve existing and new load. That is what the Commission has done here, by exercising its informed judgment. To do otherwise would not produce rates that, by law, must be "just, fair, reasonable and sufficient." (RCW 80.28.010)

The appropriate use of any one or more of these tools will depend on the factual circumstances at the time, concerning the proper alignment or "matching" of revenues, expenses and rate base during the period the newly approved rates are in effect. As the Commission has noted in Order 05, supra, the Company is experiencing the "new normal" in which increases in annual expenses and rate base exceed the growth in revenues to cover them. This "new normal" requires different "ratemaking tools," i.e., an "Attrition Adjustment."

It is squarely within the Commission's purview to apply the "used and useful" language of the statute in a way that best reflects a recognition

of plant that will be actually in-service during the period the new rates are in effect. It has done so, in this case, through the use of an Attrition Adjustment. See Inland Empire Distribution Systems v. Util. & Transp. Com'n, 112 Wn.2d 278, 770 P.2d 624 (1989) (deference is given to administrative agency's interpretation when statute is within agency's field of expertise); Premera v. Kreidler, 133 Wn. App. 23, 131 P.3d 930 (Court of Appeals, Div. II, 2006) (an agency's interpretation of the statutes it administers should be upheld if it reflects a plausible construction of the statute's language and is not contrary to legislative intent).[5]

The Attrition Adjustment approved by the Commission in Order 05 was, in fact, anchored in actual, historical data. It is not a radical departure from traditional ratemaking, and, indeed, has been used by the WUTC on various occasions beginning in the mid-1980s. (AR. 704-712) (See discussion in Order 05, supra, at pp. 19-27.) As discussed, infra, the Attrition Adjustment relies on a sure footing: As noted above, the development of an "attrition adjustment" begins with a modified test year "based on historical data." It then looks to actual levels of expense and rate base for prior years (in this case, 2007-2014) and uses statistical trending of this information to capture the relationship of expenses, revenues and rate base during the rate-effective period.

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[5] See also, Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Com'n, 110 Wn. App. 147, 39 P.3d 342 (2002 (Court of Appeals, Div. II); Waste Management of Seattle v. Util. & Transp. Com'n, 123 Wn.2d 621, 869 P.2d 1034 (En Banc) (1994); Prescott Tel. & Tel. Co. v. Washington Util. & Transp. Com'n, 30 Wn. App. 413, 634 P.2d 897 (1981) (Court of Appeals must give great weight to administrative agency's construction of its enabling statute.)

For purposes of establishing a revenue requirement, the Commission arrives at an overall level of rate base that it deems to be "used and useful" for providing service to customers. It does not otherwise make thousands of individual rate base determinations in its Order – that would, of course, prove unworkable. It has, at its disposal, any number of different "tools" or approaches in arriving at what is ultimately a factual determination of what overall level of plant is "used and useful." As noted, over time, the Commission, depending on the circumstances, has used a variety of different "tools" for that purpose. These have included, at various points, the use of a historical test period with certain pro forma adjustments and, more recently, the use of an Attrition Adjustment. The important point is that the Commission is uniquely situated as the fact-finder that must apply its informed judgment as to how best to determine the overall level of rate base during the rate period that is used and useful to provide service to customers.[6]/[7]

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[6] That is what the Commission has done with its approved Attrition Adjustment in which identifies and captures a total level of rate base for the Company's electric and natural gas operations. The overall revenue requirement as determined by Staff and the Company was based on a total level of rate base. See, Staff Ex. No. CRM-2, p.1 and CRM-3, p. 1 (see AR. 3878 and 3890), with respect to "total rate base" included in Staff's electric and natural gas attrition studies for 2016. See also the Company's attrition study EMA-6, p.1 (AR 1978) (Electric) and EMA-7, p.1 (AR. 1998) (Natural Gas), establishing 2016 overall rate base levels for purposes of its attrition study.

[7] As noted by the Supreme Court of Iowa in Iowa Planners Network v. Iowa State Commerce Com'n, 373 N.W.2d 106, 109 (1985):

> The commission is to determine whether property is used and useful by examining the utility's cumulative investments rather than individual units of property. (Emphasis added) Iowa-Illinois Gas & Electric Co., 347 N.W.2d at 429.

All of this requires the expertise and informed judgment of an expert body such as the Commission. As previously discussed, it must have the flexibility to employ the appropriate "tool" from its "toolbox" in assuring that rates are ultimately "just, fair, reasonable and sufficient" and different circumstances require different tools. (RCW 80.28.010) Indeed, if the Commission had not employed an Attrition Adjustment in this case, it would have understated the level of plant that is, in fact, "used and useful" in this case, thereby violating RCW 80.28.010 otherwise requiring that rates must be "just, fair, reasonable and sufficient."

The attrition adjustment at issue in this case does not involve uncompleted utility plant; rather, it is designed to best reflect the total level of completed utility plant that is "used and useful" and in service during the rate-effective period. (Parties, of course, may differ as to what level of plant will be "in service," but that is a dispute over facts, not law.) Based on detailed trending studies, the Commission arrived at a conclusion that best reflects the actual level of plant that will be complete and in service during the rate year.

The question of whether specific property of a public utility is used and useful and rendering service is ultimately "one of fact to be determined by a public utility regulatory commission on competent and substantial evidence." 73 C.J.S. Public Utilities, §127 (citing Kansas Gas & Elec. Co. v. State Corp. Com'n, 218 Kan. 670, 544 P.2d 1396 (1976)). Moreover, what constitutes "used and useful utility property" is committed "to the discretion of the regulatory commission." 73 C.J.S. Public Utilities,

§127 (citing Bell Tel. Co. of Penn. v. Penn. Pub. Util. Com'n, 47 P.A. Comm. 614, 408 Atl.2d 917 (1979)).

Finally, ICNU also argues that the use of an attrition adjustment does not square with the Commission's "known and measurable" test for ratemaking. (ICNU Brief at 5) It argues that an attrition adjustment does not reflect actual amounts that are otherwise measurable. ICNU is wrong in both respects. An attrition adjustment is, in fact, a technique to "measure" and assess the plant that will be in service during the rate-effective period, based on historical trending of new plant-in-service. And how is this "known"? Through the use of detailed attrition studies that measure the overall level of plant that is in service during the prospective rate period. The Commission has a variety of "tools" to "measure" the plant that will be used and useful and in service during the rate period. As circumstances change, and as new investment and expenses far exceed revenues, different techniques must be employed in order to assure that the level of plant in-service is sufficiently "measured."

III. THE COMMISSION DID NOT FAIL TO FOLLOW ITS OWN RULES AS TO WHEN AN ATTRITION ADJUSTMENT MAY BE APPLIED

In its Brief beginning at page 13, ICNU contends, "the UTC acted arbitrarily and capriciously in failing to follow its own rules as to when an attrition adjustment may be applied." (ICNU Brief at 13) While confusing, ICNU seems to suggest that there was no determination by the Commission that attrition "is" present. (Id. at p.14) In fact, the record is

replete with evidence demonstrating the consequences of a "mismatch" of revenues, expenses and rate base during the rate-effective period – all of which will serve to deny the Company a reasonable opportunity to earn its authorized rate of return. These circumstances, described as the "new normal" by the Commission (Order 05, at p.40, ¶109; AR. 725) were extensively discussed in its Order. Accordingly, there is a strong foundational basis for the Commission to have decided that the impact of attrition (or earnings erosion) is real, significant, and needs to be addressed.

Interestingly enough, ICNU then cites to a portion of the Commission's Order that actually makes the case for an attrition adjustment. ICNU cites to the Commission statement that, "The record shows that Avista's electric operations are currently financially healthy." (ICNU Brief at 14; AR 733 (Order 05 at ¶131) (emphasis added by ICNU). What ICNU failed to tell the Court is that Avista's electric operations for the prior year did provide a reasonable opportunity to earn its authorized rate of return – but only because of the recognition of the presence of earnings attrition in Avista's prior rate case (Docket Nos. UE-120436 and UG-120437). Stated differently, without the previous recognition of attrition (not on appeal here), Avista would not have achieved its authorized rate of return. And that reasonable opportunity to earn the authorized return is what the law requires.[8]

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[8] Indeed, the importance of recognizing attrition was acknowledged by the Commission in Dockets UE-120436 and UG-120437 (Docket Nos. UE-120436 and UG-120437, Order 14, ¶70 (December 26, 2012)). Avista entered into, and supported, that

ICNU finally quarrels with the Commission's language in its Order that stated, "absent an attrition adjustment, we are concerned that the Company may not have an opportunity to achieve earnings on electric operations at or near authorized levels." AR 733-34 (Order 05 at ¶131) (Brief of ICNU at 14). ICNU seems to contend that the Commission should have used the word "likely" instead of "may" with reference to the opportunity to earn the authorized returns. (Id.)

The Company presented evidence that if Public Counsel's proposed revenue decrease of $19.8 million were approved, it would only have provided a return on equity earnings opportunity for Avista of 8.21% for 2016 (the rate-effective period) as compared with the 9.5% return actually authorized by the Commission.[9]

ICNU suggests that the Commission did not follow its own rules when approving the Attrition Adjustment. (ICNU Brief at 13.) The Commission in its Order 05 found that the erosion of earnings brought on

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settlement in those dockets because the end result was expected to provide an earned return close to the Commission-authorized return for the two-year rate period. The earned ROEs for Avista for 2013 and 2014 of 9.5% and 9.9%, respectively, for Avista's combined electric and natural gas operations in Washington, are an after-the-fact confirmation that the earlier revenue increases granted based on recognition of attrition provided earned returns very close to the then-authorized ROE of 9.8%.

9 The Company calculated its opportunity to earn a return on equity (ROE) under Public Counsel's proposed $19.8 million rate reduction at only 8.21% - well below the 9.5% ROE agreed upon by all parties (including Public Counsel) as part of a Settlement Agreement, discussed infra. (AR. 1148) (See Order 06, at p.8, fn. 28). In Order 05, the Commission noted that ". . . the key Staff witness on attrition and final revenue requirement was clear in his testimony and at hearing that if the Commission only used a modified historical test year with known and measurable pro forma adjustments, the Company would likely experience attrition in the rate year and would not have a reasonable opportunity to earn a fair rate of return."(See Exh. No. CRM-1T at 9:17-18; 28:8-13 (AR. 725) (Order 05 at p.40, fn. 165)

by levels of capital investment and expense that exceed revenues represents the "new normal":

> The evidence in this case demonstrates that Avista is making increased capital investments in non-revenue generating plant (primarily on the distribution system) in an environment of low load growth. However, we do not believe that these circumstances are extraordinary. In fact, we believe that these circumstances represent the "new normal."

(AR. 725) (Order 05, at p.40, ¶109) Given this "new normal," the Commission noted that it has, in its discretion, a variety of tools in its regulatory "toolbox" for utility ratemaking; and among these "tools" is the use of an attrition adjustment. (AR.726) (Id. at p.41, ¶110)

In approving an attrition adjustment, the Commission no longer required the showing of "extraordinary circumstances" – *i.e.*, the "old rule" (as it had in the 1980s) and, instead, looked to whether there was a "new normal" in which there was increased capital investments in plant in the midst of persistent low load growth. (AR. 725) (Order 05 at p.40, ¶109) ICNU, like Public Counsel, seems to suggest that the Commission, as the agency charged with assuring that rates are ultimately "just, fair, reasonable and sufficient," should not be permitted to recognize changing circumstances. Whereas attrition adjustments in the 1980s were approved by the Commission only upon a showing of "extraordinary circumstances," the Commission has recognized that things have changed and there is a "new normal" characterized by the growth in annual costs associated with new plant investment that far outstrip the growth in annual

revenues generated from low load growth. The "public interest" requires that the Commission has the flexibility to adjust to changing circumstances, and no court should be asked to deny the Commission the flexibility to adjust to changing circumstances, as it exercises its responsibilities.

This is a case where the Commission has exercised its informed judgment and provided Avista with the realistic "opportunity" (not guarantee) to earn its authorized rate of return. As appropriately noted by the Commission, "absent an attrition adjustment, we are concerned that the Company may not have an opportunity to achieve earnings on electric operations at or near authorized levels." (AR. 733) (Order 05 at p.48, ¶131)

IV. THE COMMISSION DID NOT ENGAGE IN "UNPRINCIPLED RATEMAKING" OR BY "FIAT, DIVORCED FROM STATUTE"

Finally, ICNU accuses the Commission of "unprincipled ratemaking" that seeks to approve "any future rate result by mere fiat, divorced from any tether to statute or methodological development." (ICNU Brief at 15) It then doubles down and argues that the Commission's reliance on the "end result" test under (Hope)[10] will result in a Commission process that "will devolve into an expensive and time-consuming farce." (ICNU Brief at 16) ICNU would have this Court believe that the Commission only applied an "end results" test in arriving

[10] Fed. Power Com'n v. Hope Nat'l Gas Co., 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944).

at its decision.[11] This ignores, of course, the thousands of pages of testimony and exhibit material relating to the Attrition Adjustment that were considered by the Commission, and the 34 pages of Order 05 devoted entirely to attrition. Much work went into the Commission's deliberation and decision. It was a reasoned approached based on substantial evidence with appropriate findings.

Not only did the Commission carefully consider the evidentiary record that served as a foundation for the Attrition Adjustment, but it also considered whether the "end result," with or without an Attrition Adjustment, would be appropriate under the standards set forth in Hope and Bluefield.

After exercising diligence, assessing the voluminous evidence and documenting its findings, the Commission reached its decision on attrition. It was then – and only then – that the Commission did what the U.S. Supreme Court has instructed in Hope – i.e., to determine whether the "end result" was fair.[12]

Recognizing the very real phenomenon of attrition, the Commission in this case determined that it "must conduct a closer examination of the evidentiary record in determining whether and how to

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[11] It is important to realize that the Commission did not simply "back into" a reasonable "end result" to satisfy Hope and Bluefield. Instead, it carefully assessed the evidence in support of a detailed Attrition Adjustment which was based on substantial evidence of record. Only after doing so, did it test the resulting "end result" against the requirement that the Company be given the reasonable opportunity to earn its authorized return on equity (9.5% ROE).

[12] See Fed. Power Com'n v. Hope Nat'l Gas Co., 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333 (1944) (Hope).

authorize an attrition adjustment." (AR. 711-712) (Order 05 at p.27, ¶¶65-66) The Commission continued, "With that background and context in mind, we turn to the facts and circumstances of this proceeding in considering whether any adjustment for the effects of attrition is warranted at this time." (Emphasis added) (Ibid.) In doing so, the Commission noted the "detailed and rigorous attrition analysis" provided by Staff in support of its proposed Attrition Adjustment. (AR. 722) (Id. at p.37, ¶97) As further evidence of the Commission's detailed scrutiny of the attrition evidence, the Commission made two modifications to Staff's attrition study, the first eliminating any escalation of capital investment in distribution plant, and the second which served to adjust the operations and expenses (O&M) escalation rates. (AR. 735-736) (Order 05 at pp. 50-51, ¶¶136-137)

Public Counsel even acknowledges that the "end results test affords regulators the flexibility to choose a ratemaking methodology so long as the methodology produces rates that are just and reasonable." (Opening Brief at p.37) And that is precisely what the Commission found in the case before it: Avista's rates would not be "just and reasonable" unless an attrition ratemaking methodology was utilized that recognized that expenses and rate base are growing at a much faster pace than utility revenues.

V. CONCLUSION

For the foregoing reasons, Avista respectfully requests that the Court reject the arguments of ICNU in support of Public Counsel and otherwise affirm the Commission's Order in all respects, finding that it properly exercised its authority and expertise in resolving questions of fact.

RESPECTFULLY SUBMITTED this 3rd day of August, 2017.

Respectfully submitted,

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I certify that I have served a true and correct copy of the Answering Brief of Respondent Avista Corporation on all parties or their counsel of record on the date listed below, as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of August, 2017, at Spokane, Washington.

Patty Hanson

Patty Hanson, Legal Assistant

AVISTA

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